What Does a Textualist Look Like?

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Thomas O. Main, Jeffrey W. Stempel, & David McClure, *The Elastics of Snap Removal: An Empirical Case Study of Textualism* (Aug. 17, 2020), available on SSRN.

Who are the most textualists federal judges (at least in the context of "snap removal")? Thomas Main, Jeffrey Stempel, and David McClure conclude that they are younger, Republican-appointed, white, female judges who attended elite universities. This conclusion is but one of many important insights their empirical work offers to the continuing snap-jurisdiction debate.

For the uninitiated, snap removal is a proper (or improper) exercise of federal removal jurisdiction, depending upon your approach to statutory interpretation. The primary federal removal statute allows a state-court defendant to remove a case to federal court when it otherwise could be brought in diversity jurisdiction. One exception to this scheme, the forum-defendant rule, bars removal "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Because the statute requires the forum defendant to be both joined and served, in many states there is a window of time in which the forum defendant is joined but not yet served, during which the non-forum defendants may attempt removal. That is to say, these non-forum defendants may be able to remove if they do it as quick as a snap.

While snap removal pre-dates the Internet era, the digital age has sharpened this practice. Wealthy defendants have access to state-court-docket tracking software that empowers snap removals at breakneck speed. This practice quashes the power of the forum-defendant rule by swift action, gutting the intent of the Congress to leave suits with in-state defendants in state court. The lower federal courts—especially district courts, given the non-appealability of remand orders—have split on whether to allow such snap removals; the prevailing view, as shown in a different work by these authors, is that they are permissible.

This split offers insight into the statutory-interpretation practices of federal district court judges. While many (likely rightly) argue that the textualism-vs-purposivism dichotomy does not often animate the actual day-to-day work of the lower federal courts, the snap-jurisdiction question presses the issue. The plain text of 28 U.S.C. § 1441 allows for snap removal, yet the unquestioned intent of the Congress in drafting it in 1948 was to prevent plaintiff gamesmanship in removal and to strengthen the home-forum-defendant rule, not weaken it. As Main, Stempel, and McClure put it, "applications of this statute require either a hyper-literal reading that flouts Congressional intent or a purposive reading that evades crystal-clear text; there is no middle ground." Thus, judges facing a snap-removal question are forced to pick either the textualist or purposivist team, unless courts turn to a creative understanding of textualism and the statutory mischief rule. In important ways, then, the snap-removal question is a proxy for a judge's commitment to textualism or purposivism.

Main, Stempel, and McClure take on the empirical question of determining how this team-picking shakes out in the lower federal courts. In so doing, they offer necessary detail as to where snap removal occurs most often (California, Pennsylvania, and New Jersey), whether snap removals are increasing or decreasing (they are increasing), whether snap removals are becoming more or less successful (more successful), and whether the type of case matters (tort claims are more likely to be removed successfully than contract claims). These findings alone render this paper worth a serious look.

But for me, the most interesting insights spoke to the identities of the judges most likely to allow snap removal. Which

is to say, assuming one accepts the snap-removal question as a proxy for textualist or purposivist interpretive commitments, the authors offer deep insight as to who is on which team. Making no pretense of conveying all the nuance that they offer in this short essay, they find the following:

- Republican-appointed judges are more likely to be textualists, and Democratic-appointed judges are more likely to be purposivists.
- Female judges, appointed by either party, are more likely to be textualists than male judges.
- Younger judges, appointed by either party, are more likely to be textualists than older judges.
- Elite-university credentialed judges correlate with a commitment to textualism by Republican-appointed judges and with a commitment to purposivism by Democratic-appointed judges.

To be sure, some of these findings, like the party of the appointing president, are not surprising. But I found the gendered nature of a commitment to textualism unexpected and interesting. Similarly, the disordinal interaction for attendance at elite educational institutions was unexpected and worth pondering.

This paper raises much to consider beyond snap-removal data. To take just one question: Does this data show that gender diversity on the bench impacts outcomes in measurable ways in matters having (at least on their face) little to do with gender equity? I do not wish to suggest that the authors attempt to squeeze more and grander conclusions from their empirical findings than they can support. Nevertheless, many scholars, such as Christina Boyd, find such an impact. But these studies have focused on discrimination cases—not dusty issues of jurisdiction. I finished Main, Stempel, and McClure's paper supporting the call to diversify the bench more strongly than I had before reading.

What an unexpected result from an empirical study of snap removal. And all the more reason you should read this piece straight away.

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